United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL WITH AFFIDAVIT OF MAILING

75-1147

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P/S

To be argued by
RONALD E. DEPETRIS

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1147

UNITED STATES OF AMERICA,
Appellant,

—against—

ALFRED FAYER,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLANT

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Preliminary Statement

The United States appeals from a judgment of the United States District Court for the Eastern District of New York (Weinstein, *J.*) entered on February 27, 1975, after a non-jury trial, which acquitted the defendant-appellee Alfred Fayer of corruptly endeavoring to influence a witness in violation of 18 U.S.C. § 1503.

The defendant Fayer was charged in two indictments with participation in the offering of a bribe to a witness in violation of Title 18, United States Code, Sections 201(d) and 2 (No. 72 CR 589), and with endeavoring to influence a witness in violation of Title 18, United States Code, Section 1503 (No. 75 CR 43). On January 24, 1975, upon the motion of the United States, the two indictments were consolidated for trial. On February 4, 1975, pursuant to Rule 23(a) of the Federal Rules of Criminal Procedure, the defendant Fayer waived a jury

trial in writing with the approval of the district court and the consent of the United States.

The non-jury trial was held on February 19 and 20, 1975. At the conclusion of the trial, the district court found the defendant Fayer not guilty on the bribery offense charged in indictment 72 CR 589 and reserved decision on the obstruction of justice offense charged in indictment 75 CR 43. The district court set April 1, 1975 as the date for the submission of memoranda of law on the issue of whether Fayer had *corruptly* endeavored to influence the witness. Thereafter, on February 27, 1975, without waiting for the memoranda of law, the district court found the defendant Fayer not guilty on the obstruction of justice count and not guilty on the lesser-included offense of the bribery count (namely, a gratuity offense). Upon the request of the United States, the district court made special findings of fact pursuant to Rule 23(c) of the Federal Rules of Criminal Procedure.

The United States appeals from the judgment acquitting the defendant-appellee of obstruction of justice. It contends that the district court's finding of not guilty on the obstruction of justice charge is based on an erroneous conception of the law regarding the meaning of "corruptly", and that under the correct legal standard all of the factual issues necessary to support a finding of guilt have been resolved against the defendant-appellee Fayer.

Statement of Facts

1. Factual background

In 1971 a grand jury in the Eastern District of New York commenced an investigation into wide-ranging abuses by the real estate industry regarding Federal Housing Administration (hereinafter "FHA") programs and insured mortgages. This investigation revealed extensive bribery of FHA personnel by real estate and mortgage lending firms (see, e.g., A. 182-187, 200-202, 240).* In the fall and winter of 1971, a number of employees of the FHA and Eastern Service Corporation (hereinafter "Eastern Service"), a mortgage lending institution licensed to do business with the FHA, were subpoenaed or requested to appear before this grand jury (A. 182-187). The crux of the instant case involves efforts to influence one such witness, Edward Goodwin, to remain silent in connection with the grand jury investigation.

Goodwin was employed by the FHA as an appraiser. During the years 1967 through 1971 he received extensive illegal payments from Harry Bernstein, President of Eastern Service, and his wife, Rose Bernstein. The payments were made with intent to influence his official actions in connection with various FHA appraisals (A. 200-201). In January, 1972, Goodwin agreed to cooperate with the government (A. 209). Thereafter, on three occasions, February 1st, 8th and 9th, Goodwin, who was equipped with an electronic recording device, met with Harry and Rose Bernstein to discuss the grand jury investigation (A. 209-210, 228-231).

As the tapes indicate, at the February 8th meeting Goodwin stated to Harry and Rose Bernstein that he had discussed this matter with his attorney, who raised the

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* References to the appendix are preceded by "A".

possibility of his cooperation with the government (A. 32, 33, 56, 63-64). The Bernsteins urgently advised Goodwin not to talk (A. 57, 61) and to exercise his Fifth Amendment privilege when subpoenaed before the grand jury (A. 60). Further, they advised him not to discuss with his attorney his involvement with the Bernsteins (A. 32, 57-59). They told Goodwin that they would provide him with a good criminal lawyer as they had done with numerous of their employees who had previously been subpoenaed before the grand jury (A. 19-20, 61). The next day, February 9, 1972, Goodwin met again with the Bernsteins. They proceeded to a restaurant in West Hempstead, New York. Also present was appellee Alfred Fayer (A. 229-231).

Fayer, who had known the Bernsteins for thirty years, considered himself to be their close personal friend (A. 112, 130, 131). In addition, he was the closing attorney and did general legal work for Eastern Service (see, e.g., A. 117, 278), including helping to establish new branch offices in Florida and Atlanta (see, e.g., A. 278, 279). He was also on the Board of Directors of the corporation (A. 278); see also A. 281, 284).

Fayer had been keeping his finger on the pulse of the government's investigation for the benefit of Eastern Service (A. 293-294). Fayer had offered to obtain and had, in fact, obtained counsel for various Eastern Service employees who were possible targets of the grand jury investigation. The Bernsteins were paying the attorneys' fees (A. 100, 266, 287). Fayer had advised these employees to "sit tight" in connection with the grand jury investigation (A. 93):*

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* Unless otherwise indicated all statements attributed to Fayer which are quoted herein are from the tape recordings of his conversations with Goodwin.

> . . . everybody has to sit tight. This is what I've advised them; this is what everybody has done.

Fayer had also advised Rose Bernstein to "sit tight" before the grand jury, "no matter what they say" (A. 86). Fayer's advice to these persons to remain silent in connection with the grand jury investigation included the advice to claim the Fifth Amendment and refuse to testify when they were called before the grand jury (A. 97). Fayer's advice in this regard had been followed (A. 97):

> . . . my advice is this to them. Refuse to testify. And this is what they did . . . Each and everyone of them. Everyone did the same thing! Refuse!

In giving this advice and coordinating the tactic of everybody refusing to testify, Fayer admittedly was concerned with protecting Eastern Service and the Bernsteins (A. 310). However, Fayer did not himself represent the Bernsteins or any of the Eastern Service employees before the grand jury; he was directing the cover-up effort while at the same time trying to keep a low profile (A. 153):

> Fayer: I have representatives, I have engaged, I'm shall we say directing things. The theory is I, we have engaged attorneys for Eastern Service Corporation.
>
> R. Bernstein: We, we've engaged a number of attorneys for people (inaudible)
>
> * * * * *
>
> R. Bernstein: It would be a conflict of interest.
>
> Fayer: I don't want to be involved with anything that happens here. I don't want to involve Eastern Service Corporation.
>
> * * * * *
>
> Fayer: Even a hint.

At the time of the meeting on February 9, 1972, Fayer was aware that Goodwin was an FHA appraiser (A. 261) and that Eastern Service was a target of the grand jury investigation (A. 280). Fayer knew that there was a possibility that Goodwin might testify against the Bernsteins (A. 286, 314). He knew that Goodwin could hurt Eastern Service if he (Goodwin) made allegations of criminal activities involving the Bernsteins (A. 294). Fayer had never spoken to Goodwin about the FHA investigation or Goodwin's or the Bernsteins' possible criminal activities (A. 230, 300). Fayer also knew before the February 9, 1972 meeting that the Bernsteins had offered to pay Goodwin's attorney's fees (A. 261-262, 271, 276, 294).*

2. The corrupt endeavor to influence

Fayer began the meeting with Goodwin on February 9, 1972 by acknowledging that he was aware of the meeting between Goodwin and the Bernsteins on the previous day (A. 76). At that meeting the Bernsteins had been unsuccessful in persuading Goodwin to state definitively that he would remain silent in connection with the grand jury investigation (see generally A. 4-75). This greatly distressed Rose Bernstein, who stated to Fayer at one point in the February 9, 1972 meeting (A. 117):

> I didn't know he was doing this Al. I told him to sit tight and do nothing.

Fayer was also greatly concerned about the "danger" to the Bernsteins and Eastern Service if Goodwin went voluntarily before the grand jury (A. 263). Fayer was aware

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* It is evident, then, that even before the meeting of February 9, 1972 had begun, Fayer was more than a mere disinterested observer. He had a wide-ranging knowledge of the entire FHA investigation being conducted by the federal grand jury and had, in effect, "directed" Eastern Service's response to that investigation.

that as to white collar crimes it is very difficult to establish a case unless one of the participants cooperates with the government (A. 310). Hence, Fayer went to the meeting at the restaurant seeking to succeed where the Bernsteins had failed—i.e., to assure that Goodwin would keep quiet (A. 120-121):

> Fayer: We assume that everybody sits tight . . .
>
> R. Bernstein: Nobody says anything.
>
> Fayer: Then he doesn't have a case. Doesn't have . . .
>
> H. Bernstein: He hasn't any.
> Goodwin: No?
>
> Fayer: On the other hand . . .
>
> R. Bernstein: If somebody's gonna talk . . .
>
> Fayer: Somebody, *this is why I am here tonight. If somebody opens up, then he's got the beginnings of a case.*
>
> Goodwin: The beginnings.
>
> Fayer: That's right.
>
> [Emphasis supplied.]

Or, as Harry Bernstein stated to Goodwin later in the conversation, "If you say anything, it blows everything" (A. 143). Accordingly, at the very outset of the meeting Fayer's advice to Goodwin was to "say nothing" (A. 78).

Throughout this lengthy conversation Fayer endeavored to influence Goodwin not to go voluntarily before the grand jury and otherwise to remain silent in connection with the grand jury investigation. Fayer told Goodwin how several Eastern Service employees had helped thwart the ongoing investigation by invoking their Fifth Amendment privilege and otherwise remaining silent (A. 93, 97).

He explained the rationale behind this tactic in an effort to convince Goodwin to follow the same tactic (A. 97-98):

> Fayer: This is why I say to everyone, this is not only you . . . Everyone is in the identical position. They're damned if they do, and they're damned if they don't. You think they're not in that same position? And this is why I have said and my advice is this to them. Refuse to testify. And this is what they did . . . Each and everyone of them. Everyone did the same thing! Refuse! That was the end of it! Now, the, uh, attorney's in a position, the U.S. Attorney is in the position, he's looking for corroboration. There's no question about it. But he can't find it . . .

Fayer told Goodwin that his situation was no different than that of the others (A. 87):

> This is why when they, Rose mentioned this morning, I said, invite Goodwin to sit down, because everyone's in the same boat;

and assured Goodwin that "I'm giving you no different statement or advice now than I gave them before" (A. 89).

During portions of the February 9th meeting Fayer and the Bernsteins complemented one another in endeavoring to influence Goodwin to adopt this tactic (A. 197-198):

> Fayer: [A]nd they told Frank Fey[*], we know all about what happened to your man, so tell us the rest of it! See. Frank Fey, Frank Fey, you know Frank?
>
> Goodwin: Uh, Huh.
>
> Fayer: Frank, says drop dead.
>
> H. Bernstein: He walked out.

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* Frank Fey was an employee of Eastern Service (A. 266).

Fayer: He walked out.

R. Bernstein: Uh, that's right.

Fayer: Yeah.

H. Bernstein: What are you intimidating me?

Goodwin: Gutsy.

H. Bernstein: The hell with you and he walked out.

Fayer: Yeah.

Goodwin: Where, where was this at?

H. Bernstein: Up in right in the DA's office.

Fayer: In Accetta's office, the DA's office.

H. Bernstein: Where Accetta is, Accetta's office, he says what are you trying to intimidate me, entrap me?

Fayer: He says drop dead.

H. Bernstein: He walked out.

Fayer: He walked out.

H. Bernstein: Just like that.

Fayer: Uh, see he has said this and this is the standard ploy. Don't forget I said, we know, let's not kid ourselves. Uh, we have for our own benefit been keeping our fingers on the pulse of this thing.

H. Bernstein: We know just that's going on behind the scene.

Fayer also put himself forth as being fully aware of what was occurring in the investigations of FHA—related activities. He told Goodwin he (Fayer) was aware of the activities of the New York Department of State in relation to the FHA scandal, and those people who had testified before the Department (see, e.g., A. 122). Fayer indicated that he knew who had been before the grand jury (see, e.g.,

A. 97). Finally, he stated that he knew who was talking and cooperating with the government (see, e.g., A. 85, A. 108, A. 155).

With this broad knowledge of the investigation, Fayer endeavored to assure Goodwin that the government's investigation was getting nowhere. He constantly emphasized the weakness of the government's investigation:

> ". . . he's looking for corroboration. There's no question about it. But he can't find it" (A. 98).
>
> "They got testimony, they do like hell. If they had testimony they wouldn't come to you" (A. 105).
>
> "They haven't been able to find anything, so that . . ." (A. 111).
>
> "Like I say, I, I am saying, the district attorney is fishing" (A. 111).
>
> "He's playing with this . . . [p]laying with this since August. He has found no one" (A. 121).
>
> "Now, they're in the position where they're reaching out for everybody" (A. 122).
>
> "Everytime you hear somebody gets a subpoena, you should say good. I'll tell you why . . . [b]ecause it means he still hasn't got a case" (A. 136).
>
> As long, as he is still subpoenaing, he hasn't got a case" (A. 137).
>
> "Schiller and somebody else was down there. He doesn't have a case" (A. 137).
>
> "Why would they if they had a case, why would they need a subpoena" (A. 138).
>
> "And I, I keep saying to Rose everytime they call somebody down, it means they still have nothing" (A. 142).

"So far he's got nothing. And, I'll tell you this . . . he hasn't turned up a thing" (A. 142-143).

". . . And he's fishing. He's going all over the lot . . ." (A. 165).

Fayer further argued to Goodwin that since no one else was talking, only Goodwin could hurt Goodwin:

"When you say nothing, they have to prove the case against you. They have to make it" (A. 78-79).

"So that in my opinion, the only way anybody here is going to be hurt is if they hurt themselves" (A. 86).

"You're gonna get hurt. For no reason at all. You're foolish . . . [f]oolish to, hurt yourself" (A. 119).

"The only one that can affect you is you" (A. 123).

"What you're doing is you, you're giving them a case on yourself" (A. 124).

". . . I give you my word, as I said to them, something or things may come out, things may appear in some manner, but I tell you now, that you are not going to be hurt, really hurt, by this" (A. 132).

". . . but the only, the only one and I tell you now, there is only one person who can hurt you and that's you" (A. 133).

On the other hand, Fayer constantly emphasized to Goodwin that if he did talk "you're gonna be let go anyway, and then you're opening other avenues for yourself" (A. 80). Aside from losing his job, the other avenues which Fayer told Goodwin he would open up by talking were liability to the Internal Revenue Service and criminal liability with the government (see, e.g., A. 79, 80, 97, 119, 133, 167). In short, he tried to convey to Goodwin ". . . if you do talk you're finished anyway" (A. 166).

Fayer's endeavor to influence Goodwin not to go voluntarily before the grand jury was well emphasized by his statement to Goodwin (A. 102):

> This is the thing. Now the answer is here is what do you gain? And that, that's the real, that the real $64,000 question. What do you gain? You can only lose. You can't gain.

Although Fayer was well aware of the benefits one can receive by cooperating with the government (A. 289), he never once told Goodwin that there were any benefits in cooperating and testifying voluntarily before the grand jury. Instead, Fayer spent the entire meeting assuring Goodwin that no evil would befall him if he remained silent, and that he would only hurt himself if he went voluntarily before the grand jury.

Fayer emphasized that the principal tactic was to deny everything, regardless of the truth or falsity of the allegation.* For instance, Ortrud Kapraki was one witness whom

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* The following colloquy with the court at the trial further uncovered the "deny everything" tactic that Fayer was attempting to persuade Goodwin to adopt (A. 308-309):

> The Court: . . . Then, Rose Bernstein, I take it, addresses you and says, 'Don't you think at that point Ed' meaning Goodwin, 'should have said that testimony was [not] true'? That was directed to you, wasn't it? [that "testimony" referred to an alleged statement by an FBI agent to Goodwin that the FBI had "testimony" that Goodwin took money from the Bernsteins (A. 104, 308).
>
> The Witness: Yes.
>
> The Court: Then you say, 'Wait. Should have said it's a lie, but, however, what's the difference?' Were you advising Goodwin to say it was a lie?
>
> The Witness: No, that's in the past, your Honor. This refers to the time when the FBI agent had interviewed him and apparently he had been interviewed by the FBI. If he had been interviewed, I should have denied it instead of standing pat.

[Footnote continued on following page]

Fayer and the Bernsteins knew was cooperating with the government (A. 165):

> Fayer: Whatever she says, whatever she says is absolutely not true.
>
> H. Bernstein: She's a damn liar.
>
> Fayer: Absolutely not true.

In fact, Fayer warned Goodwin that if he accused the Bernsteins of any wrongdoing, they would deny it (A. 124-125):

> Fayer: I'll tell you this, as far as the Bernsteins are concerned, you're creating a lot of trouble but . . .
>
> R. Bernstein: We're gonna deny it.
>
> Fayer: They'll deny it.
>
> R. Bernstein: (inaudible)
>
> Fayer: I'll tell you right now, they'll deny it. So,
>
> Goodwin: Well, I'm just listening as I say there are some things I would say to them that I wouldn't say in front of you naturally.
>
> Fayer: Naturally . . .

Fayer stated that the Bernsteins would "deny it," although he still hadn't—and never did—question Goodwin as to whether or not Goodwin had engaged in criminal activities with the Bernsteins.

> The Court: You hadn't asked him if it was a lie?
>
> The Witness: No.
>
> The Court: How did you know it was a lie?
>
> The Witness: I assumed it was a lie.
>
> The Court: How did you advise him to tell a man that is a lie without inquiring?
>
> The Witness: This was in the past, your Honor. In other words, if the statement had been a lie, he should have said it's a lie.

As an attorney, Fayer attempted to give his advice greater impact by impressing Goodwin with his (Fayer's) "stature in the profession" and "standing in the profession" (A. 77, 100). Goodwin mentioned that he had discussed the matter with his attorney, who was also a friend of his (A. 94, 95, 101). Goodwin told Fayer and the Bernsteins that his attorney had raised the *possibility* of Goodwin cooperating with the government (A. 101). Fayer did not know, and had never spoken to, Goodwin's attorney (A. 312). Yet Fayer, who himself had had no criminal law experience in several years (A. 304) and very little throughout his legal career (A. 303), repeatedly attacked Goodwin's attorney as being unqualified and providing Goodwin with incompetent advice (the allegedly incompetent advice being that cooperation with the government was a *possible* alternative for Goodwin to choose).

Fayer stated that he was "stunned" (A. 100, 102), "shocked" (A. 98, 101, 118, 137), and "amazed" (A. 129) at the advice given to Goodwin by the latter's attorney. Fayer further stated that Goodwin's attorney was obviously "inexperienced" (A. 98), was not "qualified" (A. 123), and had "misled" Goodwin (A. 128). Fayer attempted to persuade Goodwin to drop his present attorney immediately and to, in effect, give ambiguous and misleading reasons for the sudden dismissal (A. 113, 125, 129, 149, 150). Fayer and the Bernsteins also told Goodwin to tell his attorney not to do any further investigating of this matter on his own (A. 125-126, 149-150).

In return for remaining silent in connection with the grand jury investigation, the Bernsteins, with Fayer actively taking part in the conversation, offered Goodwin employment with them in their Florida office in the event that Goodwin lost his job with the FHA (A. 139-140, 144-145, 164, 166-167, 170-171). Fayer indicated his approval and support of this job offer in the event that Goodwin refused to talk and lost his job (A. 166):

H. Bernstein: You're still work with us.

Fayer: *Right.* But, uh, if you do talk you're finished anyway.

[Emphasis supplied.]

Moreover, Goodwin was advised that he would be provided with a good criminal attorney as had already been done with several Eastern Service employees (A. 19-20, A. 126, 153, 177). Fayer indicated his approval and support of the offer by the Bernsteins to pay Goodwin's attorney's fees (A. 126):

> Fayer: . . . the Bernsteins have told me certain things about expenses. Let's put it that way. You know about it. I do. Uh, you're not playing a game. . . .

Shortly thereafter, on February 12, 1972, Harry Bernstein called Goodwin and told him immediately to call Fayer (A. 237). In Goodwin's subsequent call to Fayer, Fayer provided Goodwin with the name of an attorney to replace his present attorney.* Regarding attorney's fees, Fayer advised Goodwin to contact Harry Bernstein and said that there would be no problem concerning attorney's fees (A. 177).

3. Fayer's defense

The defendant Fayer took the stand in his own defense. He testified, *inter alia,* that his purpose for attending the February 9th meeting was to give legal advice to Goodwin —his concern was Goodwin (A. 263, 303). However, he admitted that he was also concerned with protecting the Bernsteins and Eastern Service—that he was fully aware that any advice could inure to their benefit (A. 263, 303, 310). He further testified that although he believed that

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* This conversation was also recorded (A. 175-178).

Goodwin was guilty of something and that the Bernsteins were innocent, he was aware of the possibility that Goodwin might testify against the Bernsteins (A. 263-264, 266, 281-283, 286, 295, 307, 314) and the possibility that the Bernsteins were involved in criminal activities with Goodwin (A. 307).

Fayer testified that he considered himself Goodwin's attorney for the purpose of the meeting (A. 279). However, Fayer also admitted: (1) that he was told by Rose Bernstein that Goodwin didn't feel he needed an attorney at that time and just wanted some advice (A. 261); (2) that he was aware that Goodwin was represented by another attorney (see, e.g., A. 298); (3) that he did not question or consult with Goodwin as to the underlying facts involved in the case (A. 298); (4) that he was not going to charge a fee (A. 264, 268, 273)* and, because there would be a conflict of interest, certainly was not going to represent Goodwin, but would give Goodwin advice (A. 264, 282, 312); (5) that Goodwin never told him that he (Goodwin) was seeking legal advice (A. 277); and (6) that even though he was aware of the possibility that Goodwin might testify against the Bernsteins (A. 263-264, 266, 281-283, 286, 295, 307, 314), he conducted his entire colloquy with Goodwin on February 9, 1972 in the presence of and with the aid of the Bernsteins—he saw no conflict at this stage, as he was not in his view giving critical advice (A. 282, 312-313).

Fayer further testified that he had thought Goodwin was seeking advice as to a course of conduct to pursue with the government (A. 304). Fayer testified that his advice to Goodwin had been to sit tight until he was subpoenaed and then to consult an attorney. Fayer claimed that his purpose was only to advise Goodwin not to talk

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* Fayer was generally of the strong belief that it was unwise for an individual to seek legal advice from an attorney without paying for it (A. 267, 44).

to the *FBI*, until he was subpoenaed and got a lawyer (A. 265, 289, 290, 305, 310). However, Fayer admitted that he advised Goodwin that the tactic had been for everyone involved to claim the Fifth Amendment when subpoenaed before the *grand jury* (A. 306-307). He also admitted that he was aware of the Bernsteins' offer to pay Goodwin's attorney's fees and to give Goodwin a job, but claimed that he believed they would be doing so only out of friendship (A. 294, 313).

4. The district court's verdict

The district court found the defendant not guilty on the obstruction of justice charge. Although the district court found that the defendant Fayer endeavored to influence Goodwin not to go voluntarily before the grand jury, it did not find that Fayer did this corruptly. It found that one of Fayer's motives was to protect the Bernsteins, but was unable to find that this was his only motive. The court stated that Fayer *may also* have wanted to help Goodwin by giving him legal advice (A. 340, 341, 345, 347, 351, 358-361).*

The district court also acquitted Fayer on the bribery and gratuity charges. On the bribery charge, the district court had a reasonable doubt whether Fayer wilfully and intentionally participated in the Bernsteins' offer to Goodwin of a job and the payment of attorney's fees (A. 337-338). On the gratuity charge, the district court found that Fayer did not aid and abet or participate in the Bernsteins' offer to Goodwin (A. 362-366).

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* Since the findings of fact made by the district court are intimately involved with the issue of appealability, they will be discussed more fully in connection with this issue in Point I, *infra*.

ARGUMENT

POINT I

The judgment of acquittal on one obstruction of justice charge is appealable.

(1)

The law is settled that the only bar to an appeal by the United States, pursuant to the Criminal Appeals Act (18 U.S.C. § 3731), is the Double Jeopardy Clause. *United States* v. *Wilson*, — U.S. —, 95 S. Ct. 1013 (1975). The application of that clause to appeals by the United States in criminal cases from non-jury trials was considered by the Supreme Court in *United States* v. *Jenkins*, — U.S. —, 95 S. Ct. 1006 (1975). In that case the Supreme Court discussed the situations in which an appeal would lie as follows (95 S. Ct. at 1011):

> In a case tried to a jury, the distinction between the jury's verdict of guilty and the court's ruling on questions of law is easily perceived. In a bench trial, both functions are combined in the judge and a general finding of 'not guilty' may rest either on the determination of facts in favor of a defendant or on the resolution of a legal question favorably to him. If the court prepares special findings of fact, either because the Government or the defendant requested them or because the judge has elected to make them sua sponte, it may be possible upon sifting those findings to determine that the court's finding of 'not guilty' is attributable to an *erroneous conception of the law* whereas the court has resolved against the defendant all of the factual issues necessary to support a finding of guilt under the correct legal standard. [Emphasis supplied.]

In the case at bar the district court did make certain special findings of fact *sua sponte*. In addition, it made further special findings of fact at the request of the United States pursuant to Rule 23(c) of the Federal Rules of Criminal Procedure. As will be shown below, the court's finding of not guilty as to the obstruction of justice charge was based on an erroneous conception of the meaning of "corruptly". Under the correct legal standard all of the factual issues necessary to support a finding of guilt have been resolved against the defendant.

(2)

On the obstruction of justice charge, the trial judge found beyond a reasonable doubt that there was a grand jury proceeding pending in the court at the relevant time, that the defendant Fayer was aware of the grand jury proceeding, that Goodwin was a "witness" in the grand jury proceeding (that is, he knew material facts and was expected to testify before the grand jury), and that the defendant Fayer knew or reasonably expected Goodwin to be a "witness" (A. 357-358).* The remaining factual issues relating to the essential elements of the crime were: Did the defendant endeavor to influence Goodwin within the meaning of the statute? If so, did the defendant do this "corruptly"?

The United States contended that Fayer endeavored to influence Goodwin to remain silent in connection with the grand jury investigation and to invoke the Fifth Amendment before the grand jury. The defense contended that Fayer's advice to Goodwin related only to the latter's talking with the F.B.I., not to his testifying before the

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* There was no substantial dispute as to these facts. Although the defense did contend that Fayer thought Goodwin was a possible defendant, not a witness (A. 322), the district court resolved this issue against the defendant (A. 358).

grand jury.* The district court resolved this factual issue against the defendant, and substantially in favor of the contention of the United States. The court did not find beyond a reasonable doubt that Fayer endeavored to influence Goodwin to take the Fifth Amendment before the grand jury (A. 358). It did find beyond a reasonable doubt that Fayer endeavored to influence Goodwin not to go voluntarily before the grand jury (A. 340, 341, 347, 351, 358, 359); the court found that this was the great danger that all were concerned with (A. 340).**

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* If this contention was factually correct, Fayer would not have committed a crime under the obstruction of justice statute. See *United States* v. *Ryan*, 455 F.2d 728, 733 (9th Cir. 1972); *United States* v. *Scoratow*, 137 F. Supp. 620 (W.D.Pa. 1956). Cf. *United States* v. *Turcotte*, — F.2d — (2d Cir. April 27, 1975, slip op. 2957, 2962-2964).

** The district court indicated that the endeavor to influence Goodwin not to testify voluntarily before the grand jury was legally the equivalent of the contention of the United States with respect to the Fifth Amendment (A. 341, 359). Surely the district court was correct in its view that such an endeavor, if done corruptly, constitutes a crime under the obstruction of justice statute. The act is an outgrowth of Congressional recognition of the variety of corrupt methods to influence a witness, limited only by the imagination of the criminally inclined. *Catrino* v. *United States*, 176 F.2d 884, 887 (9th Cir. 1949). It is designed to protect witnesses and to prevent a miscarriage of justice by corrupt methods, and is broad enough to cover *any act, committed corruptly*, in an endeavor to impede or obstruct the due administration of justice. *United States* v. *Samples*, 121 F.2d 263, 265-266 (5th Cir.), *cert. denied*, 314 U.S. 662 (1941). The statute is designed to protect not only those who are subpoenaed, but also those who testify or produce documents voluntarily. Many witnesses testify without the service of a subpoena, and a grand jury is engaged in the due administration of justice when it accepts a witness' statement that he will voluntarily appear. *United States* v. *Solow*, 138 F. Supp. 812, 815-816 (S.D.N.Y. 1956). Just as the lawful behavior of a witness invoking the Fifth Amendment cannot be used to protect the criminal behavior of the one who advised him with a corrupt motive, so the lawful behavior of a witness deciding not to appear voluntarily before a grand jury cannot protect the

[Footnote continued on following page]

The only remaining essential element of the crime is that the endeavor be committed corruptly, that is, with a corrupt motive. See *United States* v. *Cioffi, supra; Cole* v. *United States, supra.* The United States contended that Fayer's motive was to protect the Bernsteins and Eastern Service Corporation. The defense contended that Fayer's motive was to give legal advice to Goodwin. Again the district court resolved this factual issue substantially in favor of the United States and against the defendant. It found beyond a reasonable doubt that one of Fayer's motives, clearly, was to protect the Bernsteins (A. 359-360).* However, the district court indicated that it was "quite possible to find" that Fayer also had as a motive the giving of legal advice "in good faith or very foolishly" to assist Goodwin as a friend of the Bernsteins; it could not find beyond a reasonable doubt that Fayer did not *also* have this as a motive.** Although the court at one point referred to this latter motive as a "subsidiary" one, it could not determine beyond a reasonable doubt that the protection of the Bernsteins was the primary motive (A. 360-361).

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criminal behavior of the one who advised him with a corrupt motive. See *United States* v. *Cioffi*, 493 F.2d 1111, 1119 (2d Cir.), *cert. denied*, 419 U.S. 917 (1974); *Cole* v. *United States*, 329 F.2d 437, 443 (9th Cir.), *cert. denied*, 377 U.S. 954 (1964).

* As will be discussed *infra* under Point II, under the *Cole and Cioffi* cases such a motive is clearly corrupt.

** The district court credited the evidence that Fayer believed that Goodwin wanted "legal views from Fayer with respect to whether he should continue to rely upon this attorney or whether he should get a new attorney" (A. 356). Whatever his belief in this regard may have been, any fair reading of the transcripts reveals that Fayer did not give disinterested advice to Goodwin. Rather, in order to protect the Bernsteins, Fayer endeavored to persuade Goodwin not to go voluntarily before the grand jury—that is, to do what everybody else had done, remain silent in connection with the grand jury investigation.

It is clear from the transcript that the district court's conception of the law was that, in order to convict Fayer on the obstruction of justice charge, it must find beyond a reasonable doubt that Fayer's *only* motive was to protect the Bernsteins (see, e.g., A. 360-361). At the close of the trial, in discussing the issue as to whether Fayer had acted "corruptly", the court stated (A. 341, 345):

> In order not to protect the witness but to protect some other person or entity. But that isn't completely clear here. For one thing the defendant may have intended primarily to protect Eastern Service Corporation and Harry Bernstein and Rose Bernstein and yet may also have wanted to give Goodwin advice that would assist Goodwin.
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> * * * * *
>
> Obviously the defendant was interested in saving the Bernsteins and the corporation, that's clear. He has admitted it on the witness stand and the transcripts are pregnant with that. It is not clear he wasn't also trying to help . . . the prospective witness Goodwin.

Thereafter, at the time the finding of not guilty was made, the court stated (A. 360):

> I find that that [to protect the Bernsteins] was one of the motives, clearly, but I cannot find beyond a reasonable doubt that that was the only motive . . . That's the problem with the case.

Further, although the district court did state that its decision was not based on its interpretation of the legal meaning of "corruptly", it immediately added (A. 360-361):

> I think, myself, it would be corrupt for him to have advised had he not had as one of the subsidiary motives the giving of legal advice in good faith to Goodwin; that is, if the whole thing were set up

> to protect the Bernsteins rather than Goodwin, I would have found him guilty, but I do not think that, considering the whole matter, there is a very substantial doubt about whether he was not also concerned with Goodwin in good faith as a lawyer, although a lawyer acting so foolishly as to almost defy belief. But being foolish is not a crime.*

Indeed, the district court later stated that if it had "misconceived the law", it would be "of course change its decision" (A. 367).

Our position, as will be discussed under Point II, is that in a situation where the evidence is sufficient to find that a defendant had two motives, one corrupt and one good, then if the factfinder does find beyond a reasonable doubt that the defendant had as one of his motives the corrupt one, he must be found guilty. In other words, if a defendant has both a corrupt motive and a good motive, he is guilty of the crime. If a defendant merely has the good motive and does not have the corrupt one as a substantial motive, he is not guilty of the crime.** If this conception of the law is correct, the district court has resolved against the defendant all of the factual issues necessary to support

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* In at least one respect the district court in effect found that Fayer had lied. As already noted, Fayer's testimony at trial that his endeavor to influence Goodwin not to talk related only to the FBI, not to the grand jury investigation (A. 265, 290, 310) was squarely rejected by the district court, which found that the endeavor did relate to the grand jury investigation (A. 340, 341, 347, 351, 358, 359).

** It might be noted that in this case there is *not* even a finding that the defendant Fayer had the good motive. Rather the finding is that he had the corrupt motive, and it could not be determined beyond a reasonable doubt that he did not also have the good motive.

a a finding of guilt under the correct legal standard. Accordingly, if such be the law, the finding of not guilty on the obstruction of justice charge and judgment of acquittal entered thereon is appealable.

(3)

As to the bribery and gratuity offenses, the district court did *not* resolve against the defendant all of the factual issues necessary to support a finding of guilt. As to the bribery offense, the court found that the Bernsteins did offer something of value (a job and payment of attorney's fees) to Goodwin and that Fayer did aid and abet the Bernsteins. However, the district court had a reasonable doubt as to whether Fayer did this wilfully and intentionally (A. 337-338). The district court stated in this regard (A. 338):

> The defendant's testimony strikes the Court as being naive to the point of foolishness. It is difficult to believe that anyone could remain in practice for so many years and not understand what the Bernsteins were doing and not believe that the Bernsteins were using him to aid and abet them in their scheme.
>
> Based upon the defendant's demeanor the Court does have a reasonable doubt as to that point. It does have a reasonable doubt as to the state of mind and intention of the defendant [Fayer] although [he] did aid and abet the Bernsteins . . . he did not beyond a reasonable doubt do it wilfully and intentionally.

Since the law is clear that willfulness and specific intent are *not* essential elements of the lesser-included gratuity offense, on February 27, 1975 the United States asked the district court to render a verdict and make findings as to this lesser-included offense of the bribery charge. On this date the district court rendered a verdict of not guilty and found that Fayer did not aid and abet or participate in the Bernsteins' offer to Goodwin (A. 362-366).

Although when questioned the district judge stated that it was not reversing its finding as to whether Fayer aided and abetted the offer, a fair reading of the transcript indicates that the district court did reverse itself on this critical finding (A. 338).* In any event these findings of fact in favor of the defendant going to essential elements of the crime preclude an appeal of the judgment of acquittal on the bribery and gratuity offenses under the current state of the law.**

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* An examination of the evidence indicates clearly that Fayer did participate in the Bernsteins' offer to Goodwin of both the job and the payment of attorney's fees. Likewise, on the obstruction of justice count, the evidence is clear that Fayer did *not* have as a *motive* the giving of legal advice to Goodwin; rather his sole purpose was to convince Goodwin not to talk in order to protect the Bernsteins. The theme of extreme foolishness, noted above on the bribery charge, also came into play in the district court's finding with respect to the giving of legal advice; the district court stated that Fayer may have acted in this regard as a lawyer—"although a lawyer acting so foolishly as to almost defy belief" (A. 361). Although the district court's findings of fact are beyond challenge on this appeal, it is perhaps worthwhile to make the following observation. It simply "boggles the mind" (*D'Allesandro* v. *United States*, — F.2d — (2d Cir. May 1, 1975, slip op. 3387, 3399) that Fayer, who was a seasoned attorney, a close friend of the Bernsteins, and barely knew Goodwin, could (1) so actively and one-sidedly engage in the endeavor to influence Goodwin to remain silent in order to protect the Bernsteins, and yet also be genuinely concerned with giving him legal advice, and (2) be present, discuss, and support the offer to Goodwin by the Bernsteins of a job and the payment of attorney's fees, so clearly conditioned on Goodwin not implicating the Bernsteins, and yet not realize what they were doing and not even be considered to have participated in and aided and abetted the offer. A fair inference from reading the record is that Judge Weinstein's concern that a guilty verdict would have a chilling effect on the attorney-client relationship may well have affected, perhaps subconsciously, his findings of fact and verdict (A. 334-337, 340-353). This will be discussed *infra* under Point II.

** In order to protect whatever rights it had and to allow opportunity for analysis and decision, the United States initially did file a notice of appeal from this judgment of acquittal. However, that appeal is now in the process of being withdrawn.

POINT II

The defendant acted corruptly within the meaning of the statute.

(1)

The word "corruptly" as used in the obstruction of justice statute means to act with a bad, evil or improper motive or purpose. *United States* v. *Ryan*, *supra*, 455 F.2d at 734; *Martin* v. *United States*, 166 F.2d 76, 79 (4th Cir. 1948); *United States* v. *Zolli*, 51 F.R.D. 522, 526 (E.D.N.Y. 1970). Of the two motives relevant to this appeal, the giving of legal advice to Goodwin in and of itself surely is not a bad or improper motive. However, under *United States* v. *Cioffi*, *supra*, 493 F.2d at 1119, and *Cole* v. *United States*, *supra*, 329 F.2d at 442-443, Fayer's motive to protect the Bernsteins is just as clearly a bad, improper, and corrupt motive.* See also *Martin* v. *United States*, *supra*; *United States* v. *Polakoff*, 121 F.2d 333, 335 (2d Cir.), *cert. denied*, 314 U.S. 626 (1941); *Bosselman* v. *United States*, 239 F. 82, 86 (2d Cir. 1917); *Broadbent* v. *United States*, 149 F.2d 580, 581-582 (10th Cir. 1945).

The fact patterns which the *Cole* and *Cioffi* courts found to constitute "corrupt" activities are strikingly similar to the fact pattern present in the case at bar. In both *Cole* and the case at bar the defendant: (1) urgently insisted that the prospective witness should take the Fifth Amendment before the grand jury (329 F.2d at 447) (in the case at bar, Fayer strongly urged Goodwin not to go voluntarily before the grand jury, see A. 78-80, 86-87, 97-98, 102, 119-121, 124, 132-133, 166-167); (2) advised several other grand jury witnesses to remain silent and exercise the Fifth Amendment before the grand jury (329 F.2d at 443 447) (A. 86, 93, 97); (3) advised the prospective witness that everybody was taking the Fifth Amendment before the grand jury (329 F.2d at 447) (A. 93, 97-98); ((4) kept himself in-

* In *Cioffi* the district court charged the jury that "the word 'corruptly' simply means having an improper motive or purpose" (p. 481 of the transcript of the trial in that case).

formed about the progress of the government's investigation (329 F.2d at 443 (A. 85, 97, 108, 122, 155); (5) assured the prospective witness that he would not get into trouble if he talked, and said that he was foolish or stupid to talk and testify before the grand jury (329 F.2d at 447) (A. 119-121, 124, 132, 133); (6) warned the prospective witness, who was afraid of losing his job if he refused to talk, that if he did talk he would lose his job anyway (329 F.2d at 444, 448) (A. 80, 166 (7) told the prospective witness that if he took the Fifth, he (the defendant) would see to it that the witness did not lose his job (329 F.2d at 448) (in the case at bar, Fayer was aware of and supported the Bernsteins' offer to Goodwin of a job if he remained silent in connection with the grand jury investigation, see A. 139-140, 144-145, 164, 166, 167, 170-171); (8) attempted to persuade the prospective witness to use an attorney recommended by the defendant (329 F.2d at 444) (A. 98, 100, 101, 102, 113, 118, 123, 125, 128, 129, 137, 149, 150, 175); (9) told the prospective witness to keep his own attorney uninformed concerning the case (329 F.2d at 444-445) (in the case at bar, Fayer and the Bernsteins told Goodwin to tell his attorney not do any further investigating of the matter on his own, see A. 125-126, 149-150); (10) assured the prospective witness that he would pay the witness' attorney's fees (329 F.2d at 446) (in the case at bar, Fayer assured Goodwin that the Bernsteins would pay Goodwin's attorney's fees, see A. 126, 177); (11) never once told the prospective witness to tell the truth (329 F.2d at 439) (A. 76-174); and (12) contended in his defense that he was giving the prospective witness friendly advice (329 F.2d at 449) (in the case at bar, Fayer contended in his defense that he was giving Goodwin legal advice, but was not charging Goodwin a fee, see A.263, 264, 268, 273, 279, 303).

The fact pattern in *Cioffi* is also remarkably similar to the case at bar. In both *Cioffi* and the case at bar: (1) the defendant was not himself involved in the underlying criminal activity under investigation by the grand jury (493 F.2d at 1113-1115) (A. 182-187, 200-202); (2) the prospective target of the grand jury investigation recruited the

defendant to persuade the prospective witness not to talk before the grand jury, and the defendant did endeavor to influence the witness to remain silent in connection with the grand jury investigation (493 F.2d at 1116) (A. 76, 78-80, 86, 87, 97-98, 102, 119-121, 124, 133, 166-167); (3) the defendant told the prospective witness that the target of the grand jury was "on top of" the investigation (493 F.2d at 1116-1117) (in the case at bar, Fayer and the Bernsteins represented to Goodwin that they were aware of the progress of the investigation, see A. 85, 97, 108, 122, 155); (4) the defendant was aware that the prospective witness had personal knowledge of criminal activity by the target of the investigation (493 F.2d at 1119) (in the case at bar, at the very least Fayer was aware of the possibility that Goodwin might testify against the Bernsteins and the possibility that they were involved with Goodwin in criminal activity, see A. 286, 307, 314; see also A. 120-121, 124-125); (5) the defendant advised the prospective witness to "say nothing" like all the others had done (493 F.2d at 1116) (A. 78-80, 87, 93, 97-98); (6) the defendant attempted to persuade the prospective witness to let the target of the investigation get a lawyer for the witness (493 F.2d at 1116) (A. 98, 100, 101, 102, 113, 118, 123, 125, 128, 129, 137, 149, 150); (7) the defendant told the witness that he should tell the lawyer only what the target of the investigation told him to say (493 F.2d at 1116) (in the case at bar, Fayer and the Bernsteins told Goodwin to tell his lawyer not to do any further investigating on his own, see A.125-126, 149-150); (8) the defendant used other means (threats) aside from the corrupt advice in the attempt to persuade the witness to remain silent (493 F.2d at 1116, 1118) (in the case at bar, Fayer was aware of and supported the Bernsteins' offer to Goodwin of a job and the payment of attorney's fees, see A. 126, 139-140, 144-145, 164, 166-167, 170-171, 177); and (9) the defendant never once told the prospective witness to tell the truth (493 F.2d at 1116-1118) (A. 76-174).

Fayer's motivation in urging Goodwin not to go voluntarily before the grand jury is perhaps best crystalized

in the following conversation which took place at the meeting on February 9, 1972 (A. 120-121, 124-125):

Fayer: We assume that everybody sits tight . . .

R. Bernstein: Nobody says anything.

Fayer: Then he doesn't have a case. Doesn't have . . .

H. Bernstein: He hasn't any.

Goodwin: No?

Fayer: On the other hand . . .

R. Bernstein: If somebody's gonna talk . . .

Fayer: Somebody, *this is why I am here tonight. If somebody opens up, then he's got the beginnings of a case.**

Goodwin: The beginnings.

Fayer: That's right.

[Emphasis supplied.]

* * * * *

Fayer: I'll tell you this, as far as the Bernsteins are concerned, you're creating a lot of trouble but . . .

R. Bernstein: We're gonna deny it.

Fayer: They'll deny it.

R. Bernstein: (inaudible)

Fayer: I'll tell you right now, they'll deny it. So,

Goodwin: Well, I'm just listening as I say there are some things I would say to them that I wouldn't say in front of you naturally.

Fayer: Naturally . . .

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* Or, as Harry Bernstein stated to Goodwin later in the conversation, "If you say anything, it blows everything" (A. 143).

Fayer stated that the Bernsteins would "deny it", although he still hadn't—and never did—question Goodwin as to whether or not Goodwin had engaged in criminal activities with the Bernsteins. This conversation shows clearly where Fayer's loyalties resided—with the Bernsteins, not Goodwin. It shows Fayer's recognition that there were "some things" (obviously a not-so-veiled reference to wrongdoing) between the Bernsteins and Goodwin which, "naturally", would not be discussed in front of Fayer. Surely also of no little significance is the complete absence of any effort or concern by Fayer to influence Goodwin to tell the truth. Rather the thrust of the conversation is the use of the "deny everything" tactic even against Goodwin in the event that Goodwin decided to talk.

Thus Fayer's motivation to protect the Bernsteins herein was clear from the transcripts of the conversations. Indeed, it was admitted by Fayer at the trial (A. 263, 303, 310).* However, as already noted, the district court did not find beyond a reasonable doubt that Fayer did not also have as a motive the giving of legal advice to Goodwin. Accordingly, the critical question herein is whether or not a defendant is guilty of obstruction of justice when he acts with two motives—one corrupt and one bona fide. As will be shown below, the analogous case law strongly supports the view that under these circumstances the defendant is guilty of obstruction of justice.

(2)

In most cases proof of motive, either good or bad, is not relevant. For under most criminal statutes bad or improper motive is not an essential element of the crime. However, as shown above, in the case at bar the defendant's

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* In this regard the case at bar is a stronger one than *Cole*, where the corrupt motivation could only be gleaned by inference (329 F.2d at 442-443).

ultimate motive or purpose is an element of the particular offense charged. The crime of treason is another crime in which a bad motive or purpose must be proved—a purpose to give aid and comfort to the enemy. See the discussion of motive in *United States* v. *Cullen,* 454 F.2d 386, 391-392 (7th Cir. 1971).

In treason cases in which a defendant's actions have aided those of another individual (a friend or relative) whose purpose was to aid the enemy, the question of a dual motive has arisen—a motive on the part of the defendant to give aid to the enemy and injure the United States, and a motive on the part of the defendant to assist the individual through friendship. The standard which the courts have approved in such a situation supports our position herein. If the defendant's purpose was *merely* to assist the person as an individual and *not in any way* to injure the United States or aid the enemy, then the defendant must be found not guilty. *Haupt* v. *United States,* 330 U.S. 631, 641-42 (1947); *Stephan* v. *United States,* 133 F.2d 87, 99 (6th Cir.), *cert. denied,* 318 U.S. 781 (1943) [approving the charge given by the trial court, which is set forth in *United States* v. *Stephan,* 50 F. Supp. 738, 744 (D. Mich. 1943)]; *United States* v. *Fricke,* 259 F. 673 (S.D.N.Y. 1919). Applying that standard to the case at bar, Fayer should be acquitted only if his motive was *merely* to give legal advice to Goodwin and *not in any way* to protect the Bernsteins.*

Another context in which the question of a dual purpose has arisen involves the principles of corporate criminal

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* It might be noted that the proof in this case as embodied in the district court's findings of fact meets an even more stringent standard. For implicitly if not explicitly in the court's findings is one that the bad motive herein was a strong and substantial one, as strong as if not stronger than the good motive.

responsibility. If an employee performs a criminal act with intent to benefit himself and with no intent to benefit the corporation, then the corporation may not be held responsible for that criminal act by the employee. However, if an employee performs a criminal act with some intent to benefit himself and also with some intent to benefit the corporation, then the corporation is criminally responsible for that criminal act. *Standard Oil Company of Texas* v. *United States*, 307 F.2d 120, 128 (5th Cir. 1962) (fn. 14 and text relating thereto). Applying that standard to the case at bar, if Fayer acted with a purpose to give legal advice to Goodwin and with no purpose to protect the Bernsteins, then he is not guilty. However, if Fayer acted with some purpose to give legal advice to Goodwin and also with some purpose to protect the Bernsteins, then he is guilty of the crime charged.

Further, the United States Supreme Court has held that a person is criminally liable for violating provisions of federal law even if the violation of that law was only a "secondary" (*Anderson* v. *United States*, 417 U.S. 211, 226 (1974)) or "minor" (*Ingram* v. *United States*, 360 U.S. 672, 679-680 (1969)) purpose of the conspiracy. That is, the primary motivation of the defendants in these cases was to violate local law, not federal law. As far as the federal law is concerned, the primary motivation was not illegal. Yet the defendants were deemed to have violated the applicable federal law even though their purpose to violate that law was a secondary one. In the case at bar the "corrupt" motivation of the defendant was far from a secondary or minor one. Therefore, under the *Anderson* and *Ingram* rationales, Fayer did violate the federal obstruction of justice statute even though it was not found beyond a reasonable doubt that the corrupt motivation was his only motivation.

If the legal standard discussed herein is applied to the special findings of fact made by the district court, it is

clear that the defendant Fayer "corruptly endeavored to influence the witness Goodwin not to go voluntarily before the grand jury.

In the end what we have in this case, even under the findings of the district court, is a situation in which the corrupt motive was a clear and forceful one, and in which the bona fide motive was speculative, unclear, and may not even have existed. Given this juxtaposition of the two relevant motives, there can be no doubt that the defendant should be found to have acted "corruptly" within the meaning of the obstruction of justice statute. Any other finding would unjustifiably serve to promote and encourage violations of the statute. For then one could with impunity corruptly endeavor to obstruct justice, provided only that one also had in some small part a bona fide motive (such as the giving of friendly advice).

In many, if not most, situations involving an obstruction of justice, the defendant may also have had in some small part a bona fide motive. A standard which acquits a defendant where his corrupt motive is a clear, substantial and forceful one places an unwarranted obstacle in the path of enforcing the obstruction of justice statute. Accordingly, under the correct legal standard, the defendant-appellee Fayer should be found guilty on the obstruction of justice charge.

(3)

Although the meaning of "corruptly" as applied to this case has largely been resolved by the discussion *supra*, a few more comments briefly made are appropriate to show what is not involved herein. The district court was clearly concerned that a guilty verdict might have a chilling effect on the attorney-client relationship (A. 334-337, 340-353). In expressing this concern, the district court pointed (A. 336-337) to the following language of the Supreme Court in *Maness* v. *Meyers*, — U.S. —, 95 S. Ct. 584 (1975):

> The privilege against compelled self-incrimination would be drained of its meaning if counsel, being

> lawfully present . . . could be penalized for advising his client in good faith to assert it. The assertion of a testimonial privilege, as of many other rights, often depends on legal advice from someone who is trained and skilled in the subject matter, and who may offer a more objective opinion. . . . If performance of a lawyer's duty to advise a client that a privilege is available exposes a lawyer to the threat of contempt for giving honest advice it is hardly debatable that some advocates may lose their zeal for forthrightness and independence . . . if his lawyer may be punished for advice so given [in good faith] there is a genuine risk that a witness exposed to possible self-incrimination will not be advised of his right. Then the witness may be deprived of the opportunity to decide whether or not to assert the privilege [opinion of the Court, 95 S. Ct. at 595].
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> * * * * *
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> To punish him [the lawyer] for performing his professional duty in good faith would be an arbitrary interference with his client's right to the presence and advice of retained counsel—and thus a denial of due process of law [opinion of Mr. Justice Stewart concurring in the result, 95 S. Ct. at 598].*

However, this situation is not presented in the case at bar. First, a guilty verdict herein would not punish Fayer

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* The opinion of the Court, citing the *Cioffi* and *Cole* cases, recognized "that there may be instances where advice to plead the Fifth Amendment could be given in bad faith, or could be patently frivolous or for purposes of delay and such instances would present far different issues than here" (95 S.Ct. at 597, n.19). Mr. Justice Stewart further noted that "whether a contempt citation constitutes an arbitrary interference with the constitutionally protected attorney-client relationship depends on both the tenor of the advice and the circumstances under which it is given" (95 S. Ct. at 598).

for properly performing his duties as a lawyer in good faith. Rather the basis for a conviction herein is his corrupt conduct performed to protect the Bernsteins.

Second, the defense did not make any motion attacking the statute as being unconstitutional if applied to the facts of this case, or claiming that such an application would constitute and arbitrary interference with the attorney-client relationship.

Third, there simply was no attorney-client relationship between Fayer and Goodwin and no reasonable belief on Fayer's part that there was such a relationship between them. (Nor did the district court find that such a relationship or reasonable belief existed.) *

Finally, the relationship between Fayer and Goodwin was replete with a conflict of interest. Notably absent from their relationship were the traditional values sought to be fostered in the attorney-client relationship—namely, free-

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* Since as noted no motion was made below in this regard, only brief comment need be made at this time. Goodwin, who had his own attorney and was cooperating with the government, clearly was not in fact seeking legal advice from Fayer. Further, Fayer's admissions referred to in the statement of facts (*infra* at p. 16) clearly demonstrate that he had no intention of representing Goodwin and that the meeting was not held with any view on Fayer's part of representing Goodwin. See *United States* v. *Stern*, 511 F.2d 1364 (2d Cir. 1975) (on facts analogous to the case at bar, this Court concluded as a matter of law that there was no attorney-client relationship); *Prichard* v. *United States*, 181 F.2d 326 (6th Cir.), *aff'd*, 339 U.S. 974 (1950) (using factor of conflict of interest in holding that there was no attorney-client relationship); *Smale* v. *United States*, 3 F.2d 101 (7th Cir. 1924), *cert. denied*, 267 U.S. 602 (1925) (no intention of employment; conflict of interest); *Woodrum* v. *Price*, 104 W.Va. 382, 140 S.E. 346 (1927) ("curbstone" opinion with no contemplation of employment). See also 8 Wigmore, *Evidence*, §§ 2292, 2302, 2303, 2304 (McNaughton Rev. 1961). Fayer's testimony that "such a relationship existed in his mind is contrary to the facts and circumstances and the inferences to be drawn from them" (*United States* v. *Stern*, *supra*, 511 F.2d at 1368).

dom of consultation and the giving of disinterested, objective advice concerning the relevant considerations, pro and con, to the decision at hand. See generally 8 Wigmore, *supra* §§ 2285, 2291.*

Accordingly, on the facts of this case, Judge Weinstein's concern to avoid a chilling effect on the attorney-client relationship, which may well have affected his findings of fact and verdict herein, was completely misplaced.

It is clear that if Fayer were not a lawyer his conviction would have been a forgone conclusion. Surely a defendant is not immune from the application of the obstruction of justice statute merely because he is an attorney. In the end what we have in this case is a defendant who used his status as an attorney as a sword to convince Goodwin to remain silent in connection with the grand jury investigation, and now is attempting to use it as a shield from a criminal conviction. In these circumstances, where there is no valid attorney-client relationship, the

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* Again only brief comment need be made at this time. Fayer admitted that he was aware of the possibility that Goodwin might testify against the Bernsteins, and that at least in part his motive at the meeting was to protect the Bernsteins. See Canon 5 of the Code of Professional Responsibility, and the ethical considerations (EC 5-1, 14, 15, 16, 19, 21, 22, 23) and disciplinary rules (DR 5-105, 107) involved therein (which relate to the exercise of independent professional judgment on behalf of a client and the problems raised by conflicting interests). Further, Fayer failed to question Goodwin at all concerning the underlying facts in the case and advised him only as to the cons, not the pros, of talking voluntarily with the government. See EC 7-8. Moreover, Fayer was aware of and at the very least acquiesced in the Bernsteins' offer to Goodwin of a job and the payment of attorney's fees; Fayer's own endeavor to influence Goodwin was at least in substantial part based on the corrupt motive to protect the Bernsteins. See 8 Wigmore, *supra*, §§ 2298, 2299 (attorney-client privilege not applicable to a communication in furtherance of a criminal or fraudulent transaction). Cf. DR 7-109(c).

acquittal of a defendant solely on account of his status as a lawyer should not stand. A conviction herein, rather than constituting an unwarranted interference with the right of a client to independent professional legal advice by an attorney, would serve to promote that right.

CONCLUSION

The judgment of acquittal should be reversed and the case remanded with a direction to enter a judgment of conviction.

Respectfully submitted,

May 30, 1975

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

RONALD E. DEPETRIS,
GARY A. WOODFIELD,
DAVID S. GOULD,
Assistant United States Attorneys,
Of Counsel.

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

David S. Gould being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 2nd day of June 19 75 he served ~~a copy~~ two copies of the within

Brief for the Appellant

by placing the same in a properly postpaid franked envelope addressed to:

Jack Korshin, Esq.
370 East Old Country Road
Mineola, N. Y. 11501

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, Washington Street, Borough of Brooklyn, County of Kings, City of New York.

D d Gould
DAVID S. GOULD

Sworn to before me this
2nd day of June 19 75

Olga S. Morgan
OLGA S. MORGAN
Notary Public, State of New York
No. 24-0561956
Qualified in Kings County
Commission Expires March 30, 1977